1942 K Legal DEPARTMENT
A BRANCH

File No. O. Irrig / 42

Subject:— Opinions under the Bombay Irrigation Act 1879

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Office of the R.L.A.

Section 61(10) of the Bombay Irrigation Act, 1879, provides that whoever being responsible for the maintenance of a water course, or using a water course, neglects to take proper precautions for the prevention of waste of the water thereof or interferes with the authorized distribution of the water therefrom or uses such water in an unauthrised manner etc. shall on conviction be punished etc. "Such water" means water from a water course. A "water course" as derined in section 3(2) means any channel or pipe not maintained at the cost of the Provincial Goverment which is supplied with water from a canal &c. It is presumed that the irrigatêrs (1) Raghunath Kauraji, (2) Gavji Mahlu, (3) Abaji Kauraji and (4) Jomuji Gavaji ordinarily possess the right to take and use such water as flows along the water-course (see sections 21,22,26 and 28 of the Act). Their right to use is authorized and does not interfere with authorized distribution so long as it does not interfere with other irrigatêrs' right. Their right is not rendered unauthorized by the fact that the supply of the water to the water-course is the result of somebody's unauthorized and even criminal act of interference with the cancal. In other words, if the water used is from the water-course, and the rights of others are not impaired, the question of how the water happended to be in the water-course is irrelevant for the purpose of founding a charge of criminality under section 61(10) of the Act against such irrigatêrs as possess a right to take water from the water-course. Consequently the prosecution proposed is not likely to succeed.

Sd. P.H.Moos,
9/7.
Remembrancer of Legal Affairs.

U.R.to P.W.D.,No.6028, dated the 11th July 1941.

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Section 21(d) of the Bombay Irrigation Act, 1879, provides that every owner of a water-course and every person duly authorized under the Act to use a water-course shall be entitled to have a supply of water by such water-course at such rates and on such terms as may from time to time be prescribed under section 44 and by the rules made by the Provincial Government under section 70. Rule 12(4) of the Bombay Canal Rules provides that the order in which water is supplied shall be subject to the general or special orders of the Executive Engineer. It does not appear from the note of Deputy Secretary (P.W.D.) at page 44 ante whether the right to take water by turn has been prescribed by an order made under rule 12(4); and whether Raghunath Kauraji and others have taken water from the water-course out of their turn or in breach of any general or special order of the Executive Engineer. The point may be cleared with reference to any such orders to enable the R.L.A. to advise whether a prosecution will succeed on the fresh basis suggested by D.S., P.W.D. at page 44 ante.

Sd. P.N.Moos, 9/8

Remembrancer of Legal Affairs.

U.R.to P.W.D.,No.7077, dated the 11th August 1941.

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It appears from the report of the Superintending Engineer at p.79 ante that the four persons proposed to be prosecuted two viz. Abaji Kawaraji and Gabaji Gomaji unauthorisedly abstracted water from the water course to irrigate their lands. They are therefore prima facie liable to be prosecuted for the offence under section 61(2) of the Bombay Irrigation Act, 1879.

2. As regards the other two irrigators, viz. Raghunath Kawarji and Gavji Mahlu, the Superintending Engineer states that their applications for water were sanctioned and passes issued by the Sub-Divisional Officer. Under rule 8(1) of the Canal Rules, the power of rejecting or sanctioning applications for supply of water has been vested in the Executive Engineer. The expression "Executive Engineer" means the Executive Engineer in charge of Irrigation in any area and includes any officer duly empowered in that behalf (vide rule 2(h)). The Sub-Divisional Officer who issued the passes in question had the authority to sanction the water applications of these irrigators in virtue of the orders of Government issued in Government Resolution, Public Works Department No.5455/27, dated the 8th April 1940. The Sub-Divisional Officer was therefore the Executive Engineer within the meaning of rule 8(1) read with rule 2(h) of the Canal Rules. Consequently condition 1 of the pass-book, issued under his signature, which requires an irrigator to take water after getting his pass dated by the Patkari constitutes a special order of the Executive Engineer within the meaning of rule 12(4) of the Canal Rules, and the order in which the water is to be supplied to the irrigators in question is subject to that condition. Condition 1 of the pass book is therefore binding upon these irrigators, and their taking of water from the water course out of turn on the date in question would prima facie amount to us

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of water from a water course in an unauthorised manner within the meaning of section 61(10) of the Act. It therefore appears that in view of the fresh facts brought to light by the Public Works Department these two riigators also can be prosecuted for the offence under section 61(10) of the Act.

Sd. P. N. Moos,
6/1/42
Remembrancer of Legal Affairs.

U.R.to P.W.D.,No.120, dated the 7th January 1942.

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Below papers beginning with endorsement No.2286, dated the 16th May 1941, from the Superintending Engineer, Deccan Irrigation Circle, with its accompaniments and ending with P.W.D. Endorsement No.5261/36-I, dated the 14th January 1942.

No.1064.

Legal Department,

Bombay Castle, 5th February 1942.

Retransferred to the Public Works Department.

2. There is no question of instituting any civil suit or other civil proceeding in this case and rule 109 of the Law Officers' Rules has consequently no application. The Remembrancer of Legal Affairs has advised prosecution under sections 61(2) and 61(10) of the Bombay Irrigation Act. The Public Works Department is therefore requested to send the papers to the local officers viz. the Executive Engineer, Nasik Irrigation Division or the District Magistrate, Nasik, who can direct the filing of the requisite prosecutions before a Magistrate with competent jurisdiction.

3. If at any time the local officers or the Public Works Department think that in view of the importance of the case, the services of the Public Prosecutor, Nasik, should be required for conducting the prosecutions, they may move the District Magistrate or the Remembrancer of Legal Affairs for taking action under rule 39(d) of the Law Officers' Rules.

By order of the Governor of Bombay,

Sd. R.T.Katarki,

For Secretary to the Government of Bombay,
Legal Department.

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Office of the R.L.A.

The question for the consideration of the R.L.A. is whether the proviso occurring at the end of rule 28 of the Bombay Canal Rules applies both to clauses (a) and (b) of that rule.

2. Rule 28 of the Bombay Canal Rules, 1934, provides for the remission of water rates. Under that rule remission of water rates can be granted to any person where such person has suffered loss-

(a) from any stoppage, diminution or increase of his water supply due to any of the causes named in clause (d) of the proviso to section 31 of the Irrigation Act, 1879, or to any act or omission of a canal officer not provided for in the said clause; or,

(b) from failure of his crops due to any local or general calamity: provided the out-turn of the crops is not more than one quarter of the normal.

The causes named in clause (d) of the proviso to section 31 are a cause beyond the control of the Provincial Government, the execution of any repairs, alterations or additions to the canal or any measures considered necessary by any canal officer for regulating the flow of water in the canal etc. It would be seen that a person may get compensation under two sets of circumstances. The first (clause (a)) set deals with causes connected with the Provincial Government or the canal officer; and the second set deals with causes unconnected with the Provincial Government. Thus both clauses (a) and (b) provide for independent circumstances and will have to be read separately. Consequently the proviso which occurs in clause (b) cannot be said to apply also to clause (a).

Sd. P.N.Moos
11/5.
Remembrancer of Legal Affairs.

U.R.to P.W.D.,No.3963, dated the 12th May 1942.

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Legal Department.

The Company should execute a mortgage bond in favour of Government mortgaging its machinery to Government for securing the payment of water rates and other charges payable to Government.

Sd. B.G.D.

10/10
Solicitor to Government.

U.R.to the P.W.D.,No.8274 dated the 13th October 1942.

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